Supreme Court, U. S.
FILED
AUG 31 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-351

JAMES A. PINE, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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IN THE

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OCTOBER TERM, 1979

NO. _____

JAMES A. PINE, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner moves this Court to issue a Writ of Certiorari to review the Judgment and Opinion entered on August 3, 1979 by the United States Court of Appeals for the Fourth Circuit.

DECISION BELOW

The Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit is unreported, and refers to the opinion of the District Court.

The said Opinion of the United States District Court for the District of Maryland (Joseph H. Young, Judge) has not been reported as yet.

Copies of these Judgments and Opinions are found in the Appendix (A. 10-11).

JURISDICTION

This is a petition from the August 3, 1979, affirmance of the June 7, 1978, conviction of the Petitioner by the United States District Court for the District of Maryland, which Court found him guilty of six counts of Mail Fraud (18 U.S.C. Sections 1341 and 2).

Jurisdiction in invoked under Article 28 U.S.C. Section 1254(1) and the Fourth Amendment to the Constitution of the United States.

QUESTION PRESENTED

Were Petitioner's Fourth Amendment and statutory rights violated by the District Court's refusal to suppress from evidence tape recorded conversations between Petitioner and a co-defendant which were intercepted pursuant to a State Judge's oral authorization based upon an unsworn oral application for such authorization?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment IV, United States Constitution
18 U.S.C. § 2517
18 U.S.C. § 2518
Md. Ann. Code (1974) *Courts*, Sec. 10-403
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Md. Ann. Code Art. 27, Sec. 125A

STATEMENT OF THE CASE

Petitioner was charged, in a twelve-count indictment returned on November 3, 1977, with violating 18 U.S.C. 1341 and 2. On June 7, 1978, at the conclusion of a three-day trial presided over by Honorable Joseph Young, after deliberating for over eight hours, a jury convicted appellant of the first six counts charged in the indictment. Judge Young, on August 15, 1978, sentenced Petitioner to a term of three years in the custody of the Attorney General, six months to be served in a jail-type of treatment institution and the balance to be suspended with probation. Petitioner assigns prejudicial error to the Court's refusal to suppress evidence obtained by electronic surveillance.

During its case-in-chief, the Government played for the jury tape recordings of conversations between Petitioner and one John Daniel, also indicted for the same offense. Prior to trial, Petitioner moved for suppression of the conversations, and the Court – in a Memorandum Opinion and Order, reprinted in the Appendix (A. 11 - 28) – rejected Petitioner's arguments, thereby clearing the way for the Government's use at trial of all the recorded conversations.

The Government's proof at the pre-trial Suppression Hearing showed that Petitioner's alleged scheme initially came to the attention of State law enforcement officers, who turned over the acquired evidence pursuant to the May 9, 1977, testimonial disclosure Order of a State judge. On March 30, 1977, the Honorable H. Kemp MacDaniel – then an Associate Judge of the Circuit Court for Baltimore County, Maryland – entered a wiretap order for Daniel's telephone. This Order authorized the interception of calls relating to violations of Maryland's Controlled Dangerous Substances Law. Petitioner was not named in the Order.

On Saturday, April 9, 1977, Daniel – who had been injured in an auto accident while returning home in the early morning hours – telephoned Petitioner to request that Petitioner represent him in his personal injury claim. This telephone call was intercepted by Cpl. Terry Hunt of the Baltimore County Police Department. Although Detective Hunt listened to the entire discussion, he recorded only portions of Petitioner's April 9, 1977, conversation – placing the recorder on "pause" a total of three times. As a result of what he did overhear and record, Hunt reported the conversation to David Mister, Esquire, an Assistant State's Attorney for Baltimore County. After listening to the recorded portion of the conversation, Mister instructed the monitoring Officers to record future Pine-Daniel conversations, pending further instructions to be issued after he conferred with Judge MacDaniel.

On Monday, April 11, 1977, Judge MacDaniel authorized the interception of any future Pine-Daniel conversations pertaining to the automobile accident. The Judge's authorization was oral, based upon an unsworn oral presentation from Mr. Mister, in the presence of the State's Attorney for Baltimore County, another assistant State's Attorney, and one or two

members of the Baltimore County Police Department. No one took notes of this meeting, and no one can be precise in recalling exactly what transpired. It is certain, however, that no sworn application was made to the Court, and that Detective Hunt was not present. Equally certain is that the prosecutors would have instructed the monitoring officers to refrain from listening to or recording any Pine-Daniel conversations if Judge MacDaniel had so advised them, and that Detective Hunt was of the belief that, at the conclusion of this meeting, Judge MacDaniel had

> "duly ordered, that the Baltimore County Police Department and the Baltimore County State's Attorney's Office could monitor any additional conversations between James A. Pine, Jr., and John Paul Daniel relating to the crimes of False Pretenses, Attempted False Pretenses and Conspiracy to Commit False Pretenses." (Hunt's Affidavit, p. 5).

Although he did not attend the meeting, Hunt – advised of Judge MacDaniel's action by one of the officers who was present – instructed the monitors to record all future Pine-Daniel conversations. Each subsequent conversation between Petitioner and Daniel was intercepted in its entirety. Thereafter, State officers obtained the testimonial disclosure order of May 30, 1977, and turned over to federal authorities the recordings of Petitioner's conversations. The federal authorities monitored Daniel's claims – to Allstate Insurance Company, which provided first-party coverage on the vehicle Daniel had been operating at the time of the accident, and to U.S.F.& G. Company which provided liability coverage for the driver of the vehicle which had collided with Daniel's car. Letters mailed to and from these companies, in connection with the handling of Daniel's claim, constituted the 12 counts in Petitioner's indictment.

The pre-trial Suppression Hearing also concerned Petitioner's arguments that the police officers monitoring the wiretap had failed to minimize interceptions. Evidence was introduced that, because of speed-call and call-waiting features on Daniel's telephone, the monitors had to change their minimization techniques in order to be certain a drug-related call would not go undetected. The Trial Court, as had the State Judge supervising the wiretap, whose testimony was stipulated to, found no constitutional or statutory violation in this procedure – and Petitioner does not challenge it herein. As set forth below, Petitioner's claim of prejudicial error is directed at the *subsequent* Pine-Daniel conversations and therefore Petitioner hereby concedes that the Trial Court correctly found that the *first* Pine-Daniel conversation was lawfully intercepted as incidental to the drug wiretap.

At trial, through Det. Terry Hunt of the Baltimore County Police Department, the prosecution introduced into evidence all the conversations between Petitioner and Daniel which had been intercepted during the electronic surveillance of Daniel's telephone. Over Petitioner's objection, the prosecution introduced into evidence – and played for the jury – the tapes containing Petitioner's conversations with Daniel. Although not received into evidence, transcripts of these conversations were handed to the jurors in order to assist them in understanding what had been said. During deliberations, the jury returned to the courtroom on three occasions to listen to the said conversations. Ultimately, the jury convicted Petitioner.

REASONS FOR ALLOWANCE OF WRIT

This Writ of Certiorari should be granted in order to establish and clarify the guidelines necessary for police to act in the accumulation of evidence within Constitutional boundaries

when an inadvertent conversation intercepted as a result of an authorized wiretap reveals a possibility of a crime other than the crime or crimes which were described in the original Court wiretap authorization. There is a desperate need for the Court to promulgate guidelines and clarify the application of 18 U.S.C., Section 2518 (1) (a) - (e) to the interception of those anticipated conversations, and to the validity of verbal orders given by courts during the execution phase of a wiretap order.

As an "aggrieved person", 18 U.S.C. 2510(11), Petitioner clearly has standing to challenge the introduction into evidence of his conversations with Daniel. Because the conversations at issue do not involve the crimes for which the original wiretap was authorized, the government must shoulder the burden of proving that the conversations were lawfully intercepted. *United States v. Rizzo*, 494 F.2d 215 (2nd Cir. 1974). Because the May 9, 1978, testimonial disclosure order was based upon an Affidavit declaring that all but the first Pine-Daniel conversation were authorized interceptions, as such action had been "duly ordered" on April 11, 1977, the testimonial disclosure order clearly violated 18 U.S.C. 2517(5), and all but the initial Pine-Daniel conversations should have been suppressed from evidence.

The Government's argument in support of the admissibility of the conversations is as follows: (1) Hunt's interception of the first conversation was inadvertent, or incidental, and in no way violated Petitioner's Constitutional or statutory rights; (2) The subsequent Pine-Daniel conversations were not intercepted as a result of Judge MacDaniel's oral order, but were also inadvertently, incidentally intercepted during the course of the narcotics wiretap; (3) The meeting at which Judge MacDaniel gave his oral authorization for the interception of Pine-Daniel conversations involving false pretenses,

etc., was nothing more than a status report meeting – unnecessary and held because the state officers were exercising an abundance of caution; (4) Therefore, 18 U.S.C. 2517(5) controls the admissibility of the conversations and permits their use in Petitioner's Mail Fraud prosecution.

An examination of Hunt's Affidavit (in support of the State's Petition for a Testimonial Disclosure Order) clearly demonstrates that the Government's position on why the conversations are admissible changed completely between the time Judge MacDaniel gave the evidence to it and the time it responded to Petitioner's Motion for Suppression. In fact, the testimony of Detective Hunt and Assistant State's Attorney Mister, government witnesses at the suppression hearing, compels the conclusion that none of the subsequent Pine-Daniel conversations would have been recorded unless Judge MacDaniel had authorized such action. Therefore, the District Court's conclusion that the police officers "remain(ed) limited by the scope of the original warrant" is clearly erroneous.

"Except as expressly authorized in Title III . . . all interceptions of wire and oral communications are flatly prohibited." *Gelbard v. United States*, 408 U.S. 41, 46, 92 S.Ct. 2357, 2360 (1972). Because of the nature of electronic surveillance, it was always recognized that evidence of crimes other than particularized in the wire-tap order might be overheard during the execution of the order. 18 U.S.C. 2517 was designed to control disclosure of such evidence, and legitimizes the use of other crimes evidence as long as the government can demonstrate its seizure was "inadvertent," *United States v. Brodson*, 528 F.2d 214, 215 (7th Cir. 1975), "unanticipated," *United States v. Cox*, 449 F.2d 679, 687 (10th Cir. 1971) or "unexpected", *United States v. Johnson*, 539 F.2d 181, 184 (D.C. Cir. 1976). Interception of a conversation, like seizure of a tangible item, cannot be both "inadvertent" and anticipated

at the same time. The government cannot logically argue that the officers inadvertently intercepted any but the first Pine-Daniel conversation.

The government's characterization of the Aprill 11, 1977, meeting, at which Judge MacDaniel verbally authorized interception of the subsequent Pine-Daniel communications, as a mere report is not supported by the evidence produced at the suppression hearing and is flatly contradicted by Hunt's May 9, 1977, Affidavit. The conduct of the meeting violated virtually every command of the Fourth Amendment and 18 U.S.C. 2518, as well as the requirements of Maryland law for obtaining authorization to conduct electronic surveillance. No record whatsoever was made by anyone present at the meeting, so its purpose and significance cannot be determined except by "reliance upon faded and often confused memories." *United States v. Anderson*, 453 F.2d 174, 177 (9th Cir. 1971). Under these circumstances, logic indicates that the most accurate statement of what Judge MacDaniel did on April 11, 1977, is found in Hunt's Affidavit of May 9, 1977, which document was presumably carefully examined by Judge MacDaniel just prior to his entry of the testimonial disclosure order which triggered Petitioner's federal prosecution.

Although there would appear to be no need for Petitioner to cite persuasive authority to this Honorable Court for the proposition that an oral wiretap order is invalid, because it may be inconceivable to the Court that such an order would ever be entered, Petitioner points to a recent decision of the Court of Special Appeals of Maryland. In *Shingleton v. State*, 39 Md. App. 527, 387 A.2d 1134, the Court found itself faced with an oral wiretap order entered by the supervising Judge which purported to approve electronic surveillance of a person identified in the order for a crime particularized in the order but for a telephone not described in the order. Chief Judge Gilbert held:

"Because the verbal application and oral order thereon is not within the scope of the exception, 18 U.S.C. Sect. 2518 (7), to the obtaining of a written intercept order, it was absolutely worthless. It flew straight into the face of the Omnibus Crime Control and Safe Streets Act of 1968 despite the judge's good intent. The federal act prescribes, in section 2518 (1), that:

> 'Each application for an order authorizing or approving the interception of a wire or oral communication *shall be made in writing* upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application . . .' (Emphasis supplied.)

Except for provisions of section 2518(7) permitting verbal application and orders, which we have found to be inapplicable to the case *sub judice*, there are no other exigent circumstances, real or fancied, which allow an oral intercept order. The fact that the Congress mandated that such orders be 'in writing upon oath or affirmation,' section 2518(1), evidences that the Congress desired, under all circumstances save section 2518(7), in which the federal act was employed, to guarantee proper, before the fact, judicial review of the affidavit, application and the proposed order. *State v. Siegel*, 266 Md. 256, 274, 292 A.2d 86, 95 (1972), declares '(t)he statute (Title III 18 U.S.C. Sects. 2510-2520) sets up a strict procedure that *must* be followed and we will not abide any deviation, no matter how slight, from the prescribed path.' (Original emphasis). *See also Poore v. State*, 39 Md. App. 44, 47, 384 A.2d 103, 106 (1978). In *Poore*, we pointed out the

distinction between the strict pre-order compliance dictated by *Siegel* and the substantial post-order compliance absent prejudice to the accused, sanctioned by *Spease v. State*, 275 Md. 88, 338 A.2d 284 (1975). *Poore v. State*, 39 Md. App. at 51-61, 384 A.2d at 108-14.

Unquestionably, the verbal order in the case *sub judice* was governed by the strict pre-order compliance prescribed by *Siegel*. The order fails to meet that requirement and is, as we have already noted, totally invalid. We look with much disfavor upon the procedure used in the instant case, both as to the application for the order and the authorization of the interception . . . . When individual constitutional rights are rendered nugatory in the interest of expediency, then the Constitution, itself, may as well be thrown upon a scrap pile, and we declare that cases are to be decided on the basis of what is in the best interest of the State. Such a step would be, in actuality a giant-sized stride away from the concept formulated by our ancestors, when they adopted the Bill of Rights, and a synchronous move toward the non-democratic principle that what is good for the State is good for everybody. We emphatically decline to take any step toward that end."

Shingleton v. State, supra, 387 A.2d at 1139-40.

For these reasons, Judge MacDaniel's testimonial disclosure order was not based upon a neutral determination that the Pine-Daniel conversations intercepted subsequent to his verbal order to record them were the *inadvertent* product of a legitimately obtained wiretap, as required by 18 U.S.C. 2517(5). Rather, as a result of the instructions he issued on

April 11, 1977, the subsequent Pine-Daniel conversations were the project of the electronic equivalent of a "general search warrant," *Brodson*, supra, 528 F.2d at 215, and should not have been introduced at Petitioner's trial.

The state officers should have presented to Judge MacDaniel on April 11, 1977, documents satisfying the requirements of 18 U.S.C. 2518. Failure to do so cannot be justified by good faith and worthy intention, lack of secretarial assistance, and/or priority given to week-end relaxation. *United States v. Capra*, 501 F.2d 267, 277 (2nd Cir. 1974). Failure to satisfy Sec. 2518 does not permit the government to fall back on Sec. 2517(5) in order to get in through the back door what should not be admitted through the front door. Judge MacDaniel "duly ordered" what Petitioner argues to have been the functional equivalent of an *extension* to the wire-tap order - extending the wiretap to a new person and authorizing surveillance for a new crime - and such action was, for reasons discussed above, totally invalid. Therefore, the government cannot now claim that the subsequent Pine-Daniel communications were incidentally intercepted, so Sec. 2517(5) does not justify their admission into evidence. The retroactive approval under 2517(5) does not authorize continued interception of calls on the same topic. Professor James G. Carr who served as the primary author of the National Wiretapping Commission Report submitted pursuant to the mandate of Title III in April of 1976, advocates:

> "If . . . additional individuals become targets, purposes are changed, or conversations relating to other crimes are to be included, a new application satisfying the requirements of Sec's 2518(1) (a)-(e) should be filed, seeking specific authority to resume the surveillance or alter or expand its focus."

> Carr, *The Law of Electronic Surveillance* (1977) Sec. 5.09(2), p. 273. See also, Note, *Post Authorization Problems in the Use of Wiretaps: Minimization, Amendment, Sealing, and Inventories*, 61 Cornell L. Rev. 92, 127-8, 134 (1975).

Several New York decisions discuss the distinction between retroactive approval for use of inadvertently intercepted communications and the necessity for prospective authorization to overhear and record future anticipated conversations concerning crimes not specified in the wiretap order. These decisions, interpreting the New York statute (Section 700.65(4) of the Criminal Procedure Law), focus upon the Fourth Amendment issues involved in the continued interception of now anticipated non-described criminal conversations.

In *People v. DiLorenzo*, 330 N.Y.S. 2d 720 (Rockland County Court, 1971), Judge Gallucci ordered suppression of anticipated conversations intercepted without authorization, stating:

> "The invasion of an individual's right of privacy is not to be lightly condoned, whether it involves the person himself, his dwelling or his telephone conversations. It is permissible only when there is probable cause that a crime is being committed. Thus, when the interception of a conversation discloses that a crime not contained in the eavesdropping warrant is being committed, an order amending the eavesdropping warrant should be immediately obtained and surveillance continued only after a judicial determination of probable cause that the new crime is being committed (People v. Ruffino, supra). This procedure is reasonable as the probable cause justifying the original warrant may not demonstrate probable cause with respect to the new crime. In

other words, surveillance as to the new crime can be continued only by amending the existing warrant forthwith or obtaining a new warrant."
330 N.Y.S. 2d at 727

In *People v. DiStefano*, 45 A.D. 2d 56, 356 N.Y.S. 2d 316 (1974), the Appellate Division reversed convictions based upon conversations intercepted subsequent to an inadvertently overheard call but prior to the obtaining of judicial authorization to intercept the subsequent conversations. Judge Tilzer wrote:

"The police officers and Assistant District Attorney herein, were, since April 6, 1972, alerted to the plans for the robbery and thereafter when they continued to intercept communications eleven days later, which were not within the scope of the eavesdropping warrant, did so for the specific purpose of obtaining further evidence of the new crimes. Accordingly, it cannot be said that the April 17th conversations were unexpectedly overheard. (See United States v. Cox, 10 Cir., 449 F.2d 679, 687.) To allow testimony as to the contents of such communications (and with respect to evidence derived therefrom) when the evidence was intentionally obtained, without prior court scrutiny, would permit the District Attorney, in his own discretion to expand the entire scope of the eavesdropping warrant, and to thereafter legitimize such action by a subsequently obtained court order. The statute was not so intended and if it is interpreted in that manner there would be grave doubt as to its constitutionality. (See *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576; Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed. 2d 1040.)

The nature and purpose of the provisions permitting amendments to include unanticipated conversations was considered in People v. Ruffino, 62 Misc. 2d 653, 309 N.Y.S. 2d 805. In that case it was held that a delay of over three months in seeking amendment did not render inadmissible evidence which otherwise was legally intercepted. It was concluded that since only one conversation was intercepted and thereafter the wiretap was immediately discontinued defendant's rights were not affected by the failure to comply with a statutory condition subsequent. However, the Court (Shapiro, J.), stated:

"It seems apparent that the purpose the lawmakers had in mind, in requiring an amendment of an outstanding interception order where new criminal matters not specified in the warrant came to light over the wiretap, was to legalize the *continuance* on the wiretap to discover further evidence of the newly disclosed crimes . . . The failure to obey the statutory requirement that an amended order be obtained should bring into play an exclusionary rule only where the interception, *continues after an unprovided-for conversation is overheard*, for it is only the *continuation* of the wiretap which makes judicial supervision necessary for the protection of Fourth Amendment rights of privacy." (People v. Ruffino, supra, 62 Misc. 2d pp. 660-661, 309 N.Y.S. 2d p. 812.)

Further, the application for amendment must be made "as soon as practicable." That provision is not complied with where there is considerable delay after acquisition of knowledge of the new crimes, and where prior to making the application, the People, nevertheless, continue interception of matters not within the scope of their court authorization.

> Accordingly, we conclude that the conversations intercepted on April 17th and the evidence obtained as a result were inadmissible and that the motion to suppress such evidence should have been granted." 356 N.Y.S. 2d at 320-1.

The Court of Appeals of New York reversed the decision of the Appellate Division, *People v. Di Stefano*, 38 N.Y. 2d 640, 345 N.E. 548, 382 N.Y.S. 2d 5 (1976) but did so by holding that the conversations were *not* anticipated. Quoting from Senate Report 1097, 90th Congress, 2d Session (1968), the Court of Appeals preserved the frame of analysis set forth above, establishing that only where the interception is inadvertent can the retroactive application legitimize use of the conversations concerning the non-specified crime. 382 N.Y.S. 2d at p. 10.

The subsequent Daniel-Pine conversations, therefore, were intercepted pursuant to an invalid authorization. In no way were the conversations *inadvertently* intercepted because the officers believed themselves authorized to overhear and record Petitioner's conversations in order to acquire evidence of a new crime, and thus they did not remain limited by the mandate of the March 30th order with respect to the Daniel-Pine conversations. A full 2518 Order was required for such action, and the fact that one was not obtained mandates suppression.

Petitioner further urges to this Honorable Court that there exists an additional ground for suppression of the evidence challenged herein. The government does not quarrel with Petitioner's argument that no Maryland court would receive into evidence any of the Pine-Daniel conversations. The Maryland court would not receive such evidence because of the Maryland statutes prohibiting disclosure of any evidence except that which pertains to the crime specified on the face of the order. Annotated Code of Maryland, *Courts*, Sec. 10-406,

Art. 27, Sec. 125A (these statutes, which are printed as an addendum to the Brief, were repealed effective July 1, 1977. The present Maryland statute is found in the 1977 Cumulative Supplement to the *Courts*, Article, Sects. 10-401-12).

The Trial Court held that 18 U.S.C. 2510(11) does not authorize suppression of evidence received in violation of a disclosure prohibition. *United States v. Denisio*, 360. F.Supp. 715, 719 (D. Md. 1973). Disclosure aside, however, Petitioner's argument is that Maryland law did not permit *interception* of the Pine-Daniel communications because the crimes supposedly under investigation – false pretenses, attempted false pretenses, and conspiracy to commit false pretenses – cannot be *intercepted* on a wiretap. *State v. Siegel*, 13 Md. App. 444, 462, 285 A.2d 671, affd. 266, Md. 256, 292 A. 2d 86.

Petitioner never conceded that Maryland law should play no role in the determination of whether a federal court should admit evidence intercepted by Maryland officers. Petitioner requests that this Honorable Court adopt the reasoning of the Second Circuit, where the federal court determines whether to suppress by analyzing the applicable provisions of both state and federal law. *United States v. Manfredi*, 488 F.2d 588, 598 (2nd Cir. 1973, cert. den. 417 U.S. 936); *United States v. Rizzo*, 491 F.2d 215, 217 (2d Cir. 1974, cert. den. 416 U.S. 990); *United States v. Marion*, 535 F.2d 697, 702 (2d Cir. 1976).

Even if this Honorable Court rejects Petitioner's argument that the conversations at issue were intercepted in violation of federal law, it must agree that the State officers turned over to federal authorities evidence acquired in violation of Maryland law. Petitioner beseeches the Court to prohibit the fruits of electronic surveillance obtained by State officers in violation of State law and turned over to federal authorities on a "silver platter" for use in federal court. Although *Elkins*

v. United States, 364 U.S. 206, 80 S. Ct. 1437 (1960) involved violation of the Constitutional rights of an accused rather than statutory rights, Professor Carr's analysis of why the "silver platter doctrine" should apply to electronic surveillance evidence seized in violation of a state statute calls for the adoption of such a rule by this Court. Professor Carr states:

> "Despite these distinctions and cases to the contrary, evidence obtained by state officers in violation of state law should not be admissible in a federal proceeding. Although *Elkins* was based on a constitutional violation, its basic purpose was to enforce the federal standard of admissibility. In the context of electronic surveillance, one element of Title III is the latitude given to the states to enact and enforce statutes which impose greater restrictions on the use of eavesdropping by private and public parties. Thus, the general rule that the inadmissibility of evidence in a state proceeding does not preclude its admissibility in a federal proceeding collides with the policy expressed by Title III of allowing the states to impose stronger controls on the use of eavesdropping devices. If evidence which is inadmissible in a state tribunal, because it violates a more restrictive state statute, can still be brought into a federal court and used there, the state's attempt to restrict electronic surveillance will be undone. If its own officers, the effect is to defeat the intent of Congress in allowing and encouraging state enactments which are more restrictive than Title III. Thus, the force and effect of the federal law will be diminished, as it would have been in *Elkins* if the Supreme Court had allowed state officers to deliver evidence obtained in violation of the federal Constitution to federal officers on a silver platter. To avoid this consequence, evidence

> seized electronically by state officers in violation of state law should be inadmissible in federal and state courts alike, without reference to admissibility under Title III. Otherwise, federal courts will have issued an invitation to state officers to disregard state statutes which are clearly favored under Title III, and viewed as a valid supplement to the national effort to control eavesdropping."
> Carr, *The Law of Electronic Surveillance*, Clark Boardman Co., Ltd., New York, N.Y. (1977), Sec. 7.04(4) (b), p. 438.

Without question, if this Honorable Court concludes that all but the first Pine-Daniel conversation should have been suppressed, error in admitting them was certainly prejudicial, and could in no way be characterized as "harmless beyond a reasonable doubt." *Chapman v. California* 386 U.S. 18. 23-4, 87 S. Cut. 824, 827 (1967).

In this case, Petitioner was convicted on the basis of an oral authorization which had the operational effect of amending a wiretap order. Because of the complicated issues which arise during the execution phase of a wiretap, it is necessary that the Court focus upon problems which stem from the improper execution of a wiretap order valid on its face. The first rule should be that oral amendments cannot be tolerated, and this case presents the opportunity to prevent such abuse.

CONCLUSION

For the reasons heretofore cited and in reliance upon the legal authorities hereinabove set forth, it is respectfully submitted that a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit be issued herein.

Respectfully submitted,

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APPENDIX

Amendment IV, United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

18 U.S.C. § 2517. Authorization for disclosure and use of intercepted wire or oral communications.

(5) When an investigation or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

18 U.S.C. § 2518. Procedure for interception of wire or oral communications.

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall

be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire, or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that –

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify –

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobstrusively and with a minimum of interference with the services that such carrier, landlord, custodian,

or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objected, or in any event in thirty days.

Md. Ann. Code (1974) *Courts*, Sec. 10-403

§ 10-403. Ex parte order for interception.

(a) *Applications.* – An ex parte order for the interception of telephonic and telegraphic communications may be issued by a judge of a circuit court, the Supreme Bench of Baltimore City, or the District Court upon the verified application of the Attorney General or a state's attorney setting forth fully the facts and circumstances upon which the application is based and stating that:

(1) There are reasonable grounds to believe that a crime has been committed or is about to be committed.

(2) There are reasonable grounds to believe that evidence will be obtained essential to the solution of a crime, or which may enable the prevention of a crime.

(3) There are no other means readily available for obtaining the information.

(b) *Grounds to be stated.* – Where statements are solely upon the information and belief of the applicant, the grounds for the belief must be given.

(c) *Prior application.* – The applicant must state whether any prior application has been made to obtain telephonic and telegraphic communications on the same instrument or for the same person and if a prior application exists the applicant shall disclose its current status.

(d) *Identification of line.* – The application and any order issued under this section shall identify as fully as possible the particular telephone or telegraph line from which the information is to be obtained and the purpose.

(e) *Examination by court.* – The court shall examine upon oath or affirmation the applicant and any witness the applicant desires to produce or the court requires to be produced.

(f) *Duration of order.* – No order issued under this section shall be effective for longer than 30 days.

(g) *Renewal of order.* – Upon application of the officer who secured the original order, the court which issued the order may renew or continue the order for an additional period not to exceed 30 days. (An. Code 1957, art. 35, § 94; 1973, 1st Sp. Sess., ch. 2, § 1.)

Md. Ann. Code (1974) *Courts*, Sec. 10-406

§ 10-406. Admissibility of evidence.

Only evidence obtained in conformity with the provisions of this subtitle is admissible, and then only in a prosecution for the crime or crimes specified in the order of court. (An. Code 1957, art. 35, § 97; 1973, 1st Sp. Sess., ch. 2 § 1.)

Md. Ann. Code Art. 27, Sec. 125A

§ 125A. Use to overhear or record private conversation.

(a) *Use without knowledge or consent prohibited.* – It is unlawful for any person in this State to use any electronic device or other device or equipment of any type whatsoever in such manner as to overhear or record any part of the conversation or words spoken to or by any person in private conversation without the knowledge or consent, expressed or implied, of that other person.

(b) *Prevention of crime or apprehension of criminal – Petition for ex parte order authorizing use.* – However, if it shall appear to a duly authorized public law enforcement officer of this State that a crime has been, or is being, or is about to be committed, and that the use of such electronic devices are required to prevent the commission of the said crime, or to apprehend the persons who shall have committed it, then the law enforcement officer or officers shall submit to the State's attorney of the county or of Baltimore City the evidence upon which the said law enforcement officer bases his contention that an ex parte order authorizing the use of the said electronic devices is necessary; and if it shall appear to the said State's attorney that there are reasonable grounds to believe to the said State's attorney that there are

reasonable grounds to believe that a crime has been committed or is being committed or may be committed then the said State's attorney shall apply to any of the judges of the circuit court of the county or of the Supreme Bench of Baltimore City, by means of a formal ex part petition for the issuance of an order authorizing the use of the said electronic devices or equipment, and shall make oath or affirm in the said petition that there is probable cause to believe that a crime may be, or is being, or has been committed and shall state the facts upon which said probable cause is based, and further, that the use of the said electronic devices or equipment is necessary in order to prevent the commission of, or to secure evidence of the commission of such crime. In such case the affiant shall identify, with reasonable particularity, the device or devices to be used, the place or places where they are to be used, the person or persons whose conversation is to be intercepted, the crime or crimes which are suspected to have been, or about to be committed, and that the evidence thus obtained will be used solely in connection with an investigation or prosecution of the said crimes before any such ex parte order shall be issued. The applicant must state whether any prior application has been made in the same matter and if such prior application exists the applicant shall disclose the present status thereof.

(c) *Same – Issuance of order; duration; disposition.* – The judge of the circuit court of the county or of the Supreme Bench of Baltimore City shall satisfy himself that the facts stated in the petition indicate that there is probable cause for the issuance of the said order. Such ex parte order shall be effective the the time specified in the order, but for not more than thirty days unless extended or renewed by the judge, upon proper petition meeting the same requirements as the original petition. Any ex parte order so issued shall be retained by the applicant as authority for the use of the electronic device or equipment therein set out and the interception of the conversation sought to be intercepted. A true

copy of such order, together with any exhibits submitted with the petition shall be sealed and filed with the clerk of the court in which the order is issued, at the time of its issuance, provided, however, that such order shall be available to persons in interest after arrest, upon order of the court. (1959, ch. 706.)

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-5024

UNITED STATES OF AMERICA, Appellee,

-versus-

JAMES A. PINE, JR., Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph H. Young, District Judge.

Argued: July 9, 1979 Decided: August 3, 1979

Before RUSSELL, Circuit Judge, FIELD, Senior Circuit Judge, and WIDENER, Circuit Judge.

Joseph F. Murphy, Jr. (Russell J. White on brief) for Appellant; Herbert Better, Assistant United States Attorney (Russell T. Baker, Jr., United States Attorney and Lynne A. Battaglia, Assistant United States Attorney on brief) for Appellee.

PER CURIAM:

The defendant appeals his mail fraud conviction under 18 U.S.C. §§ 1341 and 1342 (1976). He asserts but one ground for appeal deserving of comment. He argues with much vigor that tape recorded telephone conversations between him and one Daniel in the course of which incriminating statements were made, should have been suppressed. The district court, however, refused his motion to suppress such conversations in an order which sets forth with ample support in the record and in the precedents the reasons for such denial. *United States v. James A. Pine, Jr.*, (D.Md. 1978) _____ F. Supp. _____ . On the basis of such order, we affirm the denial of the motion to suppress, and finding no error in the other rulings challenged by the appeal, the judgment of conviction of the defendant is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	*	
	*	
v.	*	CRIMINAL NO. Y-77-0534
JAMES A. PINE, JR., et al	*	

MEMORANDUM AND ORDER

The defendant, James A. Pine, seeks to suppress the tape recordings of several telephone conversations with the co-defendant John Paul Daniel. The government has offered these

tapes as evidence to support the charge contained in the indictment that the defendants committed mail fraud by attempting to process a false automobile accident claim. The contested conversations were intercepted while Daniel's telephone was under surveillance in March and April, 1977. Pine contends that the interception of the calls, their disclosure to the Federal Grand Jury in October, 1977, and their proposed use at trial violates the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Street Act of 1968, 18 U.S.C. § 2510 *et seq*.

The tap on Daniel's phone, sought by the Baltimore County States Attorney, was authorized by Judge H. Kemp MacDaniel of the Circuit Court of Baltimore County and was executed by the Baltimore County Police Department. Its purpose was to investigate Daniel's suspected involvement in an alleged conspiracy to sell various narcotic drugs including cocaine, PCP, and marijuana. Specifically, the investigators were looking for a local source of money which might finance a large purchase of cocaine from a supplier in Florida for which Daniel was a suspected middle-man.

Coincidentally, in the early morning of April 9, 1977, Daniel was involved in an automobile accident when another vehicle struck his car in the rear. Later that morning, he made a telephone call from the tapped phone to Pine, an attorney, to discuss the accident and the preparation of an injury claim. After intercepting this call and recognizing what he considered to be its criminal implication, the detective in charge advised the supervising Assistant States Attorney of the interception. The States Attorney brought the call to the attention of Judge MacDaniel on the morning of April 11.

Subsequent interceptions of Pine-Daniel conversations took place on April 11 at 11:34 AM and 6:08 PM, on April 12 at 8:27 PM, and on April 14 at 5:59 PM. Judge MacDaniel authorized an extension of the narcotics wiretap on April 27, 1977, but the police made no additional interceptions of conversations with Pine pursuant to it. Daniel now faces a state indictment for his narcotics involvement as well as the pending federal indictment with Pine.

Title III, 18 U.S.C. § 2517(5), explicitly contemplates the interception and admissibility of communications relating to crimes other than those specified in the order of authorization. That section provides:

> (5) When an investigative or law enforcement officer while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

In the present case the Baltimore County authorities, having intercepted the several Pine-Daniel conversations made the required application to Judge MacDaniel for an order

enabling them to disclose the contents of the interceptions. On May 9, 1977, Judge MacDaniel authorized the disclosure which Pine now challenges.

The defendant first argues that a state judge cannot enter a § 2517(5) order for the disclosure of tapes in federal proceedings. There is no basis for this contention. The statute provides that if a "judge of competent jurisdiction" makes the appropriate finding, the contents of an "other crime" interception may be used ". . .in any proceeding held under the authority of the United States. . . ." 18 U.S.C. §§ 2517(5), (3). A "judge of competent jurisdiction" includes "a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications. . . ." 18 U.S.C. § 2510(11). Judge MacDaniel of the Baltimore County Circuit Court satisfied this definition. *See United States v. Marion*, 535 F.2d 697, 708 (2d. Cir. 1976).

Next, the defendant contends that the application to Judge MacDaniel, approved on May 9, was not made "as soon as practicable." Assuming without deciding that the application could have been made several days earlier, the timing of the approval, sought and granted well before the October disclosure to the Federal Grand Jury, supplies no grounds for suppression. *See United States v. Vento*, 533 F.2d 838, 855 (3rd. Cir. 1969); *United States v. Denisio*, 360 F. Supp. 715, 720 (D. Md. 1973); *See also United States v. Donovan*, 429 U.S. 413 (1977). The case of *United States v. Brodson*, 528 F.2d 214 (7th Cir. 1975), cited by the 'efendant does not suggest a contrary result for there the government never applied for the required judicial approval.

Defendant also complains that the approval for disclosure of the interceptions was improperly granted; that contrary to Judge MacDaniel's finding, the contents were not "otherwise intercepted in accordance with the provisions of [the] chapter."

His first challenge to the substance of the disclosure order is based on the fact that an original wiretap order could not have been authorized for the crimes which the tapes allegedly reveal. *State v. Siegal*, 13 Md. App. 44, 462-3, 285 A.2d 671 (1971); *aff'd* 266 Md. 256, 292 A.2d 86 (1972). Section 2517(5), however, does not require that the unrelated "other crime" be a "designated offense", *i.e.*, a crime which can alone be the focus of a wiretap. Sen. Report 1097, 2 U.S. Code Cong. & Adm. News, 90th Cong. 2d. Sess. 2112, 2189 (1968). Accordingly, in *United States v. Daly*, 535 F.2d 434, 439-440 (8th Cir. 1976), wiretap evidence of mail fraud, for which the defendants here are indicted, was admitted under § 2517(5).

The substantive requirements of a post interception application under § 2517(5) call for:

> . . .a showing that the original order was lawfully obtained, that it was sought in good faith and not as subterfuge search, and that the communication was in fact incidentally intercepted during the course of a lawfully executed order.

Sen. Report 1097, 2 U.S. Code Cong. & Adm. News at 2189. This check is designed to close a potential avenue around the stringent requirements of Title III.

> The framers of Title III presumably intended by this requirement to prevent evasion of the several restrictions upon original applications (e.g., showing of

> probable cause, enumerated serious crime, ineffectiveness of other investigatory techniques as to that offense). Otherwise, the applicant could easily name one crime while in fact he may have anticipated intercepting evidence of a different crime for which the prequisites could not be satisfied. Such "subterfuge searches", in addition to their dissonance with Title III, would indeed run afoul of the Fourth Amendment.

United States v. Marion, 535 F.2d at 700-701.

There is no question that the original order in this case was lawfully obtained, in good faith, and was not a pretext. The wiretap has resulted in several indictments for narcotics involvement and the auto accident did not even occur until after the surveillance had begun. Accordingly, the defendant focuses his attack on the final requirement of an "other crimes" interception. He argues that his communications with Daniel were not intercepted during the course of a lawfully executed order because the state authorities failed to minimize their interceptions of Daniel's telephone calls as required by § 2518(5). This contention also lacks merit.

Preliminarily, Pine has limited standing to pursue this objection. "Fourth Amendment rights are personal rights which unlike some other constitutional rights may not be vicariously asserted." *Alderman v. United States*, 394 U.S. 165, 174 (1969). The standing provision of Title III, § 2518 (10)(a), incorporates this principle. *Id.*, 394 U.S. at 176, n. 9. Several courts, citing *Alderman*, have determined that only the subscriber to the telephone has standing to object to improper minimization, since it is his or her privacy, not the various callers', which is protected by minimization. *United States v.*

Fury, 554 F.2d 522, 526 (2d. Cir. 1977); *United States v. Poeta* 455 F.2d 117, 122 (2d Cir. 1972); *see also United States v. Ramsey*, 503 F.2d 524 (7th Cir. 1974). Because the interception of some innocent, non-pertinent conversation is inevitable, improper minimization involves repeated, unreasonable interceptions. Therefore, to make the required showing Pine would necessarily have to rely on interceptions of many calls between Daniel and third parties, thus using alleged violations of the rights of others to vindicate his own.

The defendant, citing *United States v. Scott*, 504 F.2d 194 (D.C.C. 1974), argues that standing ought to be accorded a party moving for suppression on the basis of alleged improper minimization. Under § 2518(10) (a), "any aggrieved person" may move to suppress the contents of any intercepted communication on the grounds that

> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.

Section 2510(11) includes as "an aggrieved person", "a person who was a party to any intercepted. . .communication."

At their broadest, these provisions enable a litigant to object to an interception of a communication to which he or she was a party, but only on the grounds that the interception in question was improper. A defendant has no standing to contest the admission of an interception solely on the ground that other conversations to which the movant was not a party

were unlawful. Thus, even accepting a broader view, Pine can challenge the failure to minimize only as to his own communications, and can succeed in suppressing their contents only if they were themselves a product of improper minimization.

"Minimization" requires that the police limit as much as practicable their surveillance of calls "not otherwise subject to interception under this chapter." 18 U.S.C. § 2518(5). The investigators have acted reasonably and thus within the rules of minimization if "on the whole [they] have shown a high regard for the right of privacy and have done all they reasonably could to avoid unnecessary intrusion." *United States v. Clerkley*, 556 F.2d 709, 716 (4th Cir. 1977); *United States v. Armocida*, 515 F.2d 29, 42 (3rd. Cir. 1975). The Fourth Circuit has adopted certain guidelines which aid in assessing the reasonableness of the surveillance:

> In analyzing a given case, the federal courts have considered three principal factors: (1) the nature and scope of the alleged criminal enterprise; (2) the government's reasonable expectation as to the contents of, and parties to, the conversations; and (3) the degree of judicial supervision while the wiretap order is being executed.

United States v. Clerkley, 556 F.2d at 716.

Analyzed according to these principles, the interception of the communications to which Pine was a party did not themselves violate the minimization requirements. First, the conversations were intercepted in the course of an investigation of a widespread narcotics conspiracy, an endeavor which justifies giving the police wide latitude. *United States v. Clerkley*, 556 F.2d at 716; *United States v. James*, 494 F.2d 1007,

1019 (D.C.C. 1974). In numerous cases involving investigations of similarly widespread criminal activity, the interception of all communications has been held not violative of § 2518(5). *See, e.g., United States v. Clerkley*, 556 F.2d at 717; *United States v. Chavez*, 533 F.2d 491 (9th Cir. 1976); *United States v. Scott*, 516 F.2d 751 (D.C.C. 1975); *United States v. Quintana*, 508 F.2d 867 (7th Cir. 1975); *United States v. Manfredi*, 488 F.2d 588 (2d Cir. 1973); *United States v. Bynum*, 360 F. Supp. 400 (S.D. N.Y. 1973), *aff'd*, 485 F.2d 490 (2d. Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974), *on remand*, 386 F. Supp. 449 (S.D. N.Y.), *aff'd*, 513 F.2d 533 (2d Cir. 1975).

An application of the second factor concerning the agents' reasonable expectations also yields an inference that the police were properly minimizing their surveillance when they overheard the Pine-Daniel calls. Daniel suspected that the police were tapping his phone. He and his alleged narcotics coconspirators were therefore circumspect, often beginning their conversations with innocent remarks and utilizing code language. These circumstances made reasonable a more thorough monitoring. *United States v. James*, 494 F.2d at 1019. Intensive monitoring was also necessary because of the inability of the investigators to establish the identities of Daniel's coconspirators or any timing or pattern to the narcotics related calls. *See United States v. Clerkley*, 556 F.2d at 717.

Moreover, there was reason to suspect that the Pine-Daniel communications could have some relevance to the narcotics conspiracy. Initially, at least, the detective in charge of the surveillance who monitored the April 9 conversation was not certain that Pine was not a potential financial source for Daniel's impending narcotics transaction. He was aware of Pine's association with a Michael Castiglione, a suspected drug

dealer. The opening exchanges of the April 9 conversation revealed that Pine had some prior acquaintance with Daniel. He immediately recognized Daniel's voice, and Daniel's first comment to him was, "I hate to keep bothering you on Saturday, partner." Also early in the conversation, Pine acknowledged a familiarity with Al Mosca who was thought to be dealing in drugs and who, along with Daniel, was a subject of the wiretap.

These matters do not, of course, establish probable cause to believe that Pine was involved in narcotics conspiracy. They did, however, raise a reasonable suspicion in the detective's mind and justified his continued monitoring. That these suspicions were not subsequently confirmed is irrelevant. The police were charged with the duty of investigating a drug conspiracy in which there was probable cause to believe Daniel played a major role. The monitors therefore had the responsibility to listen to any of his conversations which could produce the evidence sought.

Before the detective could confirm or reject his suspicions, the evidence of the other criminal activity became apparent. Neither the April 9 nor the succeeding communications began with any substantial amount of innocent, irrelevant conversation which should have caused a cessation of the monitoring. Thus, the police were not violating the minimization requirements as they started to listen to what is alleged to be evidence of the mail fraud. In sum, the defendant can only base his minimization argument on the fact that the subject matter of the conversations was not related to the crime of narcotics trafficking, concerning as it did another potential crime.

However, the interception of a call relating to a crime different from that originally designated is not by itself violative of the minimization requirement. Significantly, § 2518

(5) does not require surveillance be limited to "related" calls but that it "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter. . . ." Under § 2517(5) a call which the investigators have properly begun to listen to and which relates to another crime not specified in the original order, is subject to interception. "Other crimes" subject matter is not that which the minimization requirement is designed to insulate from police scrutiny. The case law reflects the understanding that minimization does not *per se* prohibit other crime interceptions by the reference to § 2518(5) as precluding the interception of unrelated, *innocent* conversations. *See, e.g., United States v. Clerkley*, 556 F.2d at 716; *United States v. Armocida*, 515 F.2d at 43.

To hold otherwise on this point would require the police to cease monitoring a call, or a portion of a call obviously relating to crime B, however serious, when wiretapping for crime A. This view was emphatically rejected in *United States v. Johnson*, 539 F.2d 181, n.26 (D.C.C. 1976).

> We recognize, of course, that there is an obligation on the part of judges and investigators to make reasonable efforts to minimize the interception of conversations unrelated to the original purpose of the tap. This obligation is of both statutory, 23 D.C. Code § 547(g) (1973); 18 U.S.C. § 2518(5) (1970), and constitutional dimensions. *Berger v. New York*, 338 U.S. 41, 59, 87 S.Ct. 1873, 18 L.Ed. 2d. 1040 (1967). However, we reject the contention that it is any part of this obligation to shut off one's recorder in the midst of a properly authorized and conducted interception, when unexpected incriminating evidence presents itself.

The result proposed by the defendant would extinguish the effect of § 2517(5) except in the rare case where the discussion of the "other crime" was so interrelated or intertwined with the principal crime that the police have to listen to the discussion of one to avoid missing reference to the other. There is no basis for such a truncation of § 2517(5) by which Congress clearly intended to allow the interception of evidence of crimes unrelated to that designated in the original order. In preserving § 2517(5) from a different attack, the court in *United States v. Cox*, 449 F.2d 679, 687 (10th Cir. 1971), discussed the unsatisfactory results of eliminating "other crimes" interceptions:

> It would be irrational to hold that officers authorized to listen to conversations about drug traffic, upon learning that a bank robbery is to occur, must at once close down the project and not use the information to prevent the robbery since the information is tainted. It would be demoralizing to allow the bank to be robbed while the investigators stood by helpless to prevent the occurrence. Harder cases can be imagined. For example, in electronic surveillance of organized criminals involved in gambling, information might be intercepted disclosing a conspiracy to commit murder. Surely the officials must be empowered to use this information notwithstanding the lack of specific prior authorization.

Even if the minimization requirement were read to require the investigators to cease monitoring whenever they come across a conversation which relates to another crime and which could not turn to a discussion of the relevant crime, the police were justified in continuing their surveillance.

Soon after the police instituted the surveillance of Daniel's telephone, they discovered that it had a new feature, a "call-waiting" system, by which Daniel was able to receive an incoming call, signaled by a low beeping sound, during the course of another telephone conversation. The possibility of an intervening, pertinent call going undetected by the agents was exacerbated by the fact that over 50% of the narcotics related calls intercepted were of a duration of less than one minute. The police therefore feared not only missing the opening remarks (especially the caller's identity) but also the entirety of an intervening conversation.

Pine contends that the switch to the incoming call is accompanied by a slight increase in voltage and could therefore have been picked up electronically, obviating the need for monitoring. The government's expert disputed this, testifying that the slight, instanteous variation in voltage could not be reliably perceived in the manner the defendant suggests.

Uncontroverted testimony showed that the police were not aware that Daniel's phone had this feature which only recently had become available to Baltimore area subscribers. The division's wiretap technical advisor testified that although he had heard of the capability, he has never faced it in the context of a wiretap. Without in any way suggesting that electronic means cannot and ought not be developed which can detect the changeover to a second call, the Court is satisfied that it would be unreasonable under all the circumstances of this case to require that the police should have had such monitoring equipment available. Thus, to properly execute the original wiretap order and effectively investigate the narcotics conspiracy, it was necessary for the police to listen to each of the Daniel-Pine conversations.

The third and final fact by which the agent's minimization procedures involved in the Pine interceptions are assessed is the degree of judicial supervision. In this regard the police were extremely diligent. Immediately after the interception the detectives and the States Attorney attempted to reach Judge MacDaniel. When they did meet with him they gave him a transcript of the first conversation which he examined in part for its compliance with the minimization requirement, finding that the incriminating conversation was not preceded to any degree by innocent remarks. By visiting the wiretap plant on April 11, Judge MacDaniel was also immediately apprised of the second Daniel-Pine interception. Thereafter, the detectives reported to him every several days, as they had previously.

In sum, the Daniel-Pine conversations would have been intercepted during the most restrictively minimized surveillance. Because of this, the motion to suppress on this ground cannot succeed. Pine's standing makes it unnecessary to assess the minimization procedures generally followed in the interceptions of Daniel's conversations with others. Similarly unnecessary, since the minimization in question was proper, is a determination of the appropriate remedy for a failure to minimize. *See United States v. Cox*, 462 F.2d 1293, 1301-1302 (8th Cir. 1972); *see also United States v. Scott*, 516 F.2d at 760 n.19; *United States v. London*, 424 F. Supp. 556 (D. Md. 1976), *aff'd on other grounds*, sub nom.; *United States v. Clerkley*, 556 F.2d 709; *United States v. Curreri*, 363 F. Supp. 430, 437 (D. Md. 1973); *United States v. Askins*, 351 F. Supp. 408 (D. Md. 1972).

The defendant asserts another ground on which he contends that the contested interceptions were not "incidental to a lawfully executed" original order. He refers to Maryland law, effective at the time the interceptions were made, which makes

inadmissible at trial evidence obtained from electronic surveillance relating to crimes other than those designated in the wiretap order. Md. Cts. and Jud. Proc. 10-401(8). He then concludes that a similar standard of admissibility for a state initiated and executed wiretap ought to control in a federal court. However, this Court finds more persuasive the reasoning of *United States v. Curreri*, 388 F. Supp. 607 (D. Md. 1974), in which this same argument was rejected.

The defendant concedes, as he must, that federal law (*i.e.*, Title III) governs the question of the admissibility of evidence of a federal crime sought to be introduced in a federal court. *See United States v. Marion*, 535 F.2d at 701. Section 2516(2) of Title III explicitly provides for the use in federal court of evidence obtained by state officials under the authorization of a state judge. In such a case the interceptions are "lawful" if they satisfy the stricter of state or federal procedure for obtention and are admissible in federal court if "lawful". 18 U.S.C. §§ 2517(3), 2518(10) (a), 2515; *United States v. Marion*, 535 F.2d at 700-702; *United States v. Manfredi*, 488 F.2d at 598 n.7; Sen. Report 1097, 2 U. S. Code Cong. & Adm. News 2112, 2187 (1968). Title III incorporates stricter state law to control the application, authorization and execution of a state order, but does not rely on external standards for admissibility. *United States v. Curreri*, 388 F. Supp. at 614-618.

Although the Maryland wiretapping statute, effective until July 1, 1977, precluded the admission of other crimes interceptions at a state trial, it did not prohibit this type of interception. No civil or criminal penalties sanctioned such interceptions which could lawfully be used for many purposes. Thus, the Daniel-Pine interceptions which conformed with all the Maryland interception standards, as well as those of Title III, are admissible in federal court.

The defendant protests that to hold these interceptions admissible would defeat the design of Title III to encourage the states to establish their own more restrictive wiretap requirements and revive the silver platter doctrine rejected in *Elkins v. United States*, 364 U.S. 206 (1960). Neither statement is accurate. The suggested policy of Title III is satisfied to the extent that state personnel must observe more restrictive state regulations relating to interception by electronic devices. Similarly, the *Elkins* case in which the Supreme Court ordered suppressed evidence in federal court obtained by state agents in violation of the Fourth Amendment, is clearly inapposite and, thus, does not compel a closer adherence to state law.

The defendant's final argument pertains to the interception of his conversations subsequent to April 9. He maintains that the police anticipated a discovery of evidence relating to a crime other than the distribution of narcotics. He reads § 2517(5) to prohibit "other crimes" interceptions which are not inadvertent in this sense and argues that if the section does not it contravenes the Fourth Amendment. He makes this argument despite the application of § 2517(5) to multiple "other crimes" interceptions in *United States v. Johnson*, 539 F.2d at 184, and the unanimity among courts that § 2517(5) is constitutional. *See, e.g., United States v. Cox*, 449 F.2d 679; *United States v. Tortorello*, 480 F.2d 764, 781, n.15 (2d. Cir. 1973).

In so arguing, Pine relies on an analogy to the "plain view" exception to the Fourth Amendment warrant requirement for a physical search and seizure. A preliminary problem with his theory is that although the plurality opinion in *New Hampshire v. Coolidge*, 403 U.S. 443, 466 (1971), suggested it, inadvertence has never been established as a necessary

component of the plain view exception. *See Cady v. Dombrowski*, 413 U.S. 433 (1973); *Harris v. United States*, 390 U.S. 234 (1968). Recognizing that electronic surveillance, because of its insidious nature, may require more stringent safeguards than those for a physical search and seizure (*United States v. Cox*, 449 F.2d at 686), it will be assumed that inadvertence is a requirement of § 2517(5).

Nevertheless, the inadvertence required must be judged from the time the original wiretap authorization is obtained. As the plurality in *Coolidge* indicated, the evil which an inadvertence requirement seeks to avoid, is a "*planned* warrantless seizure" (emphasis added) in which the police know before obtaining the warrant of the existence and location of physical evidence not named in the warrant. *New Hampshire v. Coolidge*, 403 U.S. at 471, n.27. The Constitution does not insist that the police should have turned off their recorders when the post-April 9 conversations began anymore than it prohibits the police from seizing a second bag of heroin in plain view after having found a first in plain view during a warranted search of a house for firearms. As Judge MacDaniel found in granting the disclosure order on May 9, the Baltimore County authorities clearly did not contemplate at the time they applied for the Daniel wiretap that it would uncover evidence of mail fraud.

A refusal to suppress the recordings made in situations similar to the post-April 9 interceptions does not create a general warrant. The police remain limited by the scope of the original warrant. They must, as they were in this case, be monitoring the conversations pursuant to a valid authorization, initiated for some other crime, and be fully in compliance with the requirements of Title III. To hold otherwise would not give additional protection to an individual's privacy interest.

In cases such as this, the police will already have a right to intrude upon a person's conversation. A contrary result here would only restrict the law enforcement officer's ability to bring the perpetrator of a crime to justice without a corresponding increase in the protection of anyone's right to privacy.

For the foregoing reasons, it is this 23rd day of March, 1978, by the United States District Court for the District of Maryland, ORDERED:

That the motion of the defendant James A. Pine for a dismissal of the indictment and to suppress the fruits of electronic surveillance be, and the same is, hereby DENIED.

/s/ Joseph H. Young
United States District Judge

Supreme Court, U.S.
FILED
OCT 24 1979
CLERK

No. 79-351

In the Supreme Court of the United States

OCTOBER TERM, 1979

JAMES A. PINE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The *per curiam* order of the court of appeals (Pet. App. A10-A11) is not reported. The opinion of the district court (Pet. App. A11-A28) is reported at 473 F. Supp. 349.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1979. The petition for a writ of certiorari was filed on August 31, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly declined to suppress recordings of telephone conversations that were intercepted under a state court but were used in a federal prosecution that was unrelated to the offense for which the court order had been issued.

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted on six counts of mail fraud, in violation of 18 U.S.C. 2 and 1341. Petitioner was sentenced to six-months' imprisonment to be followed by two years' probation. The court of appeals affirmed (Pet. App. A10-A11).

1. The evidence at trial showed that on April 9, 1977, co-defendant John Paul Daniel was involved in an accident with a construction company truck in Baltimore County, Maryland.[1] Later that same day Daniel telephoned petitioner, a lawyer with whom he was acquainted, to request that petitioner represent him in his personal injury claim (Pet. 4; Pet. App. A20). Petitioner instructed Daniel to go to the hospital and "[t]ell them you got whiplash, your back and neck are bothering you * * *." Petitioner stated that he had "a great doctor" who "writes good reports and nice permanency" and that "that's where the money's at." Petitioner further informed Daniel that "we'll get you on therapy three times a week for the next month or two," that we can get a "nice statement" on lost wages, that the amount of money involved "depends on how long we can keep you going to the doctor," and that Daniel would "pick [himself] up three or four thousand dollars * * * [he'll] definitely get at least two, three thousand to stick in [his] pocket, play money" (App. 72-

[1]Daniel pleaded guilty and testified as a government witness at petitioner's trial.

75).[2] Subsequently, petitioner instructed Daniel to get a false wage loss letter and to conceal his prior back problems from the physician to whom he was referred (*id.* at 79, 82-83, 88, 104-107, 113-114).[3]

Thereafter, petitioner notified the insurance company that insured the car driven by Daniel that a claim would be made under the personal injury protection provision of the policy and that Daniel was "experiencing medical problems" and "losing wages" (T. Tr. 33-34). Petitioner also mailed the company a letter purporting to be from Daniel's employer that stated that Daniel was to have reported for work on April 11, 1977, that his starting salary was to have been $350 per week, and that he did not report for work due to the accident (Government Exhibit 4D; T. Tr. 34-37). Petitioner also sent the insurance company a copy of a medical report that said that Daniel had never suffered a condition the same as or similar to the one about which he was now complaining (T. Tr. 39-40). In addition, petitioner pursued a third-party claim against the company that insured the construction company truck, and he mailed to this insurer documentation purporting to be from Daniel's employer

[2]"App." refers to the appendix that petitioner filed in the court of appeals; "S. Tr." refers to the transcript of the suppression hearing of January 30, 1978; and "T. Tr." refers to the trial transcript. Because the trial transcript and the government's trial exhibits were not available to us in time to prepare this Brief in Opposition, the citations herein to those sources are taken from the government's brief in the court of appeals.

[3]Approximately four and one-half years before the accident, Daniel had spinal meningitis and was hospitalized for a period of ten days; thereafter, on one occasion he had to use a cane to relieve the pressure in his back. Daniel also had previously obtained a workmen's compensation award for a back injury (T. Tr. 121-122).

concerning lost wages (Government Exhibit 5C; T. Tr. 64-65) and a medical report that gave no information concerning Daniel's prior back problems (T. Tr. 78).[4]

In June 1977, after petitioner learned that the case was being investigated, he told Daniel that he would no longer be able to handle the case, that he would refer Daniel to another lawyer, and that Daniel should "forget about any lost wages and a lost wage letter" (T. Tr. 133).

2. The government's evidence at trial included tape recordings of conversations between petitioner and Daniel that were recorded during electronic surveillance of Daniel's telephone conducted by local police pursuant to an order of a Maryland Circuit Court Judge. This surveillance had been authorized on March 30, 1977, to investigate the suspected involvement of Daniel and one Alphonso Mosca in an alleged conspiracy to sell illicit drugs, including cocaine, PCP, and marijuana (App. 12-19). In monitoring the wiretap on April 9, 1977, the police overheard Daniel's call to petitioner and learned of the accident and of petitioner's instructions to Daniel (*id.* at 72-75). The police listened to this conversation because of petitioner's reference at the beginning to Mosca, with whom petitioner indicated some familiarity, and because of their awareness of petitioner's association with one Michael Castiglione, a suspected drug dealer (S. Tr. 25, 18-19). After hearing the April 9 conversation, the police

[4]Representatives from the insurance companies testified that knowledge of petitioner's instruction to Daniel to conceal his prior back problems would have led them to believe that there was "something not right," that in order to determine the nature and extent of the claimed injuries "it is important to know if the individual had any prior injuries," and that such knowledge would have affected the manner in which the claim was handled (T. Tr. 43-44, 59, 78-80).

and the state's attorney met with the judge who had issued the interception order and gave him a transcript of the conversation. The judge agreed that the April 9 conversation was not protected by the attorney-client privilege, that it had been properly intercepted, and that the police in the future did not have to disregard conversations between petitioner and Daniel regarding the ongoing commission of a crime (App. 124-125, 129, 131, 137-138; S. Tr. 71-72, 96, 98, 104-105). Thereafter, between April 11 and April 21, 1977, the police intercepted six additional conversations on the monitored telephone between petitioner and Daniel relative to the accident (App. 76-86, 87-89, 90-105, 109-112). On the state's application under 18 U.S.C. 2517, the issuing judge on May 9, 1977, entered an order permitting the disclosure and use of these intercepted telephone conversations (App. 54-55).

ARGUMENT

1. Petitioner contends (Pet. 6-16) that the tape recordings of his telephone conversations with co-defendant Daniel, which concerned their unlawful mail fraud scheme and which were intercepted in the course of the electronic surveillance of Daniel's telephone authorized by the state court judge, should have been suppressed under the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*, because the criminal offense involved in those conversations differed from the offense for which the surveillance had been authorized.[5] The gravamen of

[5]Suppression is required under Title III only for a "failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *United States* v. *Giordano*, 416 U.S. 505, 527 (1974); *United States* v. *Donovan*, 429 U.S. 413, 433-434 (1977).

his contention is that, having discovered that Daniel and petitioner were apparently engaged in a scheme to defraud insurance companies, the officers should have procured a separate authorization to intercept conversations relating to that scheme, and that the oral approval of such interceptions by the state judge was constitutionally and statutorily invalid.[6] The district court, after conducting an evidentiary hearing, rejected this contention, and the court of appeals, in an unpublished order, affirmed on the basis of the district court's extensive opinion.

Whether or not the issue petitioner presents might, in the abstract, justify consideration by this Court, the facts of this case establish that his claim for suppression of his intercepted conversations is without merit. This is accordingly not a suitable case to undertake review of the legal issues presented by the petition.

Petitioner concedes (Pet. 6) that the conversation of April 9, in which he initiated the fraudulent scheme (see pages 2, 4 *supra*), was properly intercepted incidental to the wiretap relating to the narcotics offenses. In addition, the district court found, and petitioner does not dispute, "that the original [wiretap authorization] order in this case was lawfully obtained, in good faith, and was not a pretext" (Pet. App. A16) and that the police "clearly did not contemplate at the time they applied for the Daniel wiretap that it would uncover evidence of mail fraud" (*id.* at A27). The district court also determined, in a finding again not challenged by petitioner, that "there was reason to suspect that the communications [between petitioner

[6]We note that the wiretap statutes do not appear to authorize the use of electronic surveillance for the investigation of mail fraud or corresponding state offenses. See 18 U.S.C. 2516.

and Daniel] could have some relevance to the narcotics conspiracy" (*id.* at A19) and that the facts known to the police "raise[d] a reasonable suspicion [that petitioner was involved in the narcotics conspiracy] and justified [the] continued monitoring" (*id.* at A20).[7] Finally, the uncontested findings of the district court establish that "Daniel * * * and his alleged narcotics co-conspirators * * * often beg[an] their conversations with innocent remarks and utiliz[ed] code language * * * [which] made reasonable a more thorough monitoring" (*id.* at A19), that "[n]either the April 9 nor the succeeding communications began with any substantial amount of innocent, irrelevant conversation which should have caused a cessation of the monitoring" (*id.* at A20), and that there was "[t]he possibility [due to Daniel's "call-waiting" system for receiving an incoming call during the course of another telephone conversation] of an interven-ing, pertinent call going undetected by the agents [which] was exacerbated by the fact that over 50% of the narcotics related calls intercepted were of a duration of less than one minute" (*id.* at A23).

Based on the foregoing findings, the district court concluded (Pet. App. A23, A24):

> Thus, to properly execute the original wiretap order and effectively investigate the narcotics conspiracy, it was necessary for the police to listen to each of the * * * conversations [between petitioner and Daniel].
>
> * * * * *

[7]One of the monitoring agents was aware of petitioner's association with Michael Castiglione, a convicted narcotics dealer (S. Tr. 18, 19), and with Al Mosca, who was a subject of the wiretap investigation (S. Tr. 25).

> In sum, the * * * conversations [between petitioner and Daniel] would have been intercepted during the most restrictively minimized surveillance.[8]

Since the conversations thus could have been properly intercepted even had they turned out to be wholly innocuous, the fact that they related to a mail fraud scheme could make them no less subject to interception in the course of the narcotics investigation. In these circumstances, an objective assessment of the interceptions, see *Scott* v. *United States*, 436 U.S. 128 (1978), demonstrates that the monitoring and recording of the telephone conversations between petitioner and Daniel were fully proper.

Petitioner asserts (Pet. 9, 12, 16, 19), however, that the discussions between the police officers and the supervising judge, and the judge's agreement that the police should continue to monitor petitioner's conversations with Daniel if a crime was being committed, amounted in effect to an impermissible authorization for a new electronic surveillance. This assertion is belied by the record.[9] The testimony at the suppression hearing showed that the police advised the judge of the April 9 conversation between petitioner and Daniel because of the officers' concern about the possibility of a breach of the

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[8]The district court also found that the interception of the conversations between petitioner and Daniel did not violate the minimization requirements of 18 U.S.C. 2518(5) (Pet. App. A18) and that the police were "extremely diligent" in reporting to the issuing judge and keeping him apprised of developments in accordance with 18 U.S.C. 2518(6) (*id.* at A24).

[9]As discussed above, the record also contradicts petitioner's contention (Pet. 8) "that none of the subsequent * * * conversations [between petitioner and Daniel] would have been recorded unless [the issuing judge] had [orally] authorized such action."

attorney-client privilege. After hearing the recorded conversation and considering the applicable law, the judge advised the officers that the attorney-client privilege did not apply here because the conversation was in furtherance of a crime, and therefore that they could continue to monitor these conversations if a crime was being committed (App. 125, 129, 137-138).[10] Thus, the record does not support petitioner's assertion that there was an oral expansion of the existing wiretap authorization or an oral authorization for a new wiretap, in violation of 18 U.S.C. 2518.

Nor is petitioner correct in contending (Pet. 16) that, because of the judge's oral statements, the police officers "did not remain limited by the mandate" of the original authorization order. As discussed above, petitioner's conversations were monitored in accordance with the written interception order and not under the authority of an oral order. In this situation the district court was fully justified in concluding that the police officers did not act pursuant to a "general warrant. The police remain[ed] limited by the scope of the original warrant" (Pet. App. A27).

2. Petitioner also contends (Pet. 16-19) that the recordings should have been suppressed at his federal trial for mail fraud because state law, as it existed at the time of the wiretap,[11] would not have permitted such

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[10]The district court was correct in concluding that the attorney-client privilege did not protect these conversations, since that privilege is inapplicable to communications in furtherance of ongoing criminal activity. See, *e.g.*, *Clark* v. *United States*, 289 U.S. 1, 15 (1933); *In re Doe*, 551 F. 2d 899 (2d Cir. 1977).

[11]Md. Cts. & Jud. Proc. Code Ann. § 10-406 (1974) (Pet. App. A7), on which petitioner relies (Pet. 16-17), was repealed effective July 1, 1977. This statute limited the admissibility of a recorded interception to "a prosecution for the crime or crimes specified in the [authorization] order of court."

recordings to be used as evidence in a state criminal proceeding on state fraud charges. However, the district court correctly held that state law, where stricter than Title III, controls "the application, authorization and execution of a state [wiretap] order" but that federal law determines the admissibility of evidence in a federal trial (Pet. App. A25). This ruling was correct and does not conflict with the decisions in other circuits. See, *e.g.*, *United States* v. *Nelligan*, 573 F. 2d 251, 253-254 (5th Cir. 1978) ("[I]t is well settled that federal law governs the admissibility of tape recordings in federal criminal cases."). Relying on the decision in *United States* v. *Curreri*, 388 F. Supp. 607 (D. Md. 1974), the district court then determined that the prior state statute did not prohibit the type of interception at issue here but rather only precluded the admission of such interceptions in a state trial (Pet. App. A25). This interpretation of state law is consistent with the language of the statute and the interest of the state in prescribing the rules of admissibility for its own courts.[12] In any event, since petitioner's contention regarding a now-repealed Maryland statute has been rejected by two federal district judges sitting in Maryland, no further review of this issue is warranted.[13]

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[12]The courts in both this case and in *Curreri* have rejected petitioner's view (Pet. 17) of *State* v. *Siegel*, 13 Md. App. 444, 285 A. 2d 671 (1971), aff'd, 266 Md. 256, 292 A.2d 86 (1972). In any event, petitioner's argument (Pet. 17) that state law does not permit wiretaps for false pretense offenses is irrelevant to the issue concerning the use of interceptions that properly occurred during a narcotics investigation.

[13]Since no violation of any federal or state law occurred, there is no occasion to consider, as petitioner urges (Pet. 17-19), the applicability of the "silver platter" doctrine. See *Elkins* v. *United States*, 364 U.S. 206 (1960).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1979